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(1)

IN THE

Supreme Court of the United States

WILLIAM B. ROOZ,

Petitioner,

v.

DAVID KIMMEL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does 11 U.S.C. § 523(a)(2)(A) allow an adversary proceeding based upon a debtor's entry into a conspiracy to fraudulently transfers assets with his wife and insiders to defeat the creditor's judgment?

2. Are allegations of a conspiracy to enter into fraudulent acts to defeat a judgment which specify that the debtor and his wife have engaged in effective transfers of specific assets, held by one or the other or insiders, which assets have not been recorded or disclosed in bankruptcy schedules, and includes a promise to satisfy a creditor's judgment made to a state court without intention to perform sufficient to obtain discovery under Rules 8 and 9(b) of the Federal Rules of Civil Procedure?

3. Is a State Court Order based on promises made by the debtor in a state collection proceeding to make payments upon the debt dischargeable as a matter of law notwithstanding the doctrine of Judicial Estoppel and allegations that the promise has been made with an intention to evade payment of the judgment?

4. Do 11 U.S.C. § 105 and Fed. R. Civ. P. 15 require that a bankruptcy court in dismissing an action upon conclusions that wrongs may have been committed, but remedies lost, including those based upon pleading requirements, allow amendment of the pleading?

5. Do allegations that a spouse holds assets which have not been identified in a bankruptcy petition by reason of fraudulent transfers support jurisdiction of a bankruptcy court over the wife under the provisions of 11 U.S.C. § 524(a)(3)?

LIST OF PARTIES

This is a petition by William B. Rooz, upon consolidated cases, which asserts relief against Mr. David Kimmel and his wife Mrs. Roberta Kimmel.

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CITATIONS TO OPINIONS

The only published opinions are in the Roberta Kimmel case. They are reported at 378 B.R. 630, 2007 DJDAR 17265 and 367 B.R. 166.

STATEMENT OF JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1). The Ninth Circuit's Memorandum Decision in the David Kimmel case was rendered November 25, 2008, (Appendix A); Petition for Panel Rehearing was denied on December 23, 2008 (Appendix C).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

11 U.S.C. § 523(a)(2)(A)

11 U.S.C. § 727

28 U.S.C. § 1367

(*See* Appendix D)

STATEMENT OF THE CASE

A. The adversary proceedings against David Kimmel

Mr. Rooz had obtained a judgment in the state court against Mr. David Kimmel on May 30, 1995 for $114,834.99. After appeal, the judgment was amended to the amount of $515,000 plus prior interest on September 27, 1997. By May 30, 2006, the judgment was in the amount of $1,081,500.

David Kimmel, a married man, filed a Voluntary Petition under Chapter 7 of the United States Bankruptcy Code in the United States Bankruptcy Court for the Northern District of California on October 16, 2005 in his name only. Jurisdiction is based upon 28 U.S.C. § 1334. The schedules for the petition in bankruptcy claimed he had no assets except for $6,300 in personal property of which only $800 was in liquid assets. He stated his salary to be $2500 a month and listed expenses at $2650 a month. He listed the United States, upon a restitution order entered in 1992 for $952,800, the judgment of the Petitioner for $982,366.30, as creditors and other debts which total liabilities came to $2,080,034.48. No reference was made to holdings of community property. During the day of the creditor's meeting of December, 2005, the Trustee's attorney and Mr. Rooz received information that David Kimmel and his wife, Roberta Kimmel, had entered into a Post Nuptial Property Agreement. Petitioner filed or sought to file three *in pro per* adversary proceeding complaints against Mr. Kimmel. The fourth complaint was filed by the undersigned on July 5, 2006. Two of the *in pro per* complaints became subject to motions to dismiss under

Fed. R. Civ. P. Rule 12(b)(6) based upon Rule 9(b). The first complaint was dismissed with leave to amend. The amended complaint which consisted of material documents was met with a motion to dismiss. Before argument Petitioner sought to file the third complaint. Debtor responded to this filing with a Reply Memorandum in Support of Motion to Dismiss. Before the hearing date, the fourth amended complaint for Judgment Upon Frauds was filed. It is attached hereto as Appendix E. The fourth amended complaint seeks, firstly, to prevent the discharge of a California state order because of promissory fraud and, then, avers the promise is but part of a continuing conspiracy to prevent satisfaction of the judgment by hiding real estate properties and bank deposits. It seeks appropriate relief based on these fraudulent concealments. The order in the State court was made on September 29, 2005 and provided for monetary payments of $400.00 a month until satisfaction of Mr. Rooz's judgment of approximately one million dollars It was asserted that the provisions of 11 U.S.C. § 523(a)(2)(A) prevented discharge from the Order. Full relief upon the unlawful transfers was requested. Mrs. Roberta Kimmel was alleged to be a conspirator and a summons was sought to be served. The State Court Order was entered during a hearing upon a wage garnishment in which the debtor sought exemption. At the hearing Mr. Kimmel made the offer of payment of $400.00 a month. The offer was accepted and an Order entered. Two weeks later, Mr. Kimmel, after making payment of $1,005, filed for bankruptcy.

At the hearing upon the Motion to Dismiss, the bankruptcy judge was concerned with the defenses that there could be no showing of reliance upon the promises

of Mr. Kimmel and that the court lacked power to raise fraudulent transfer rights in an adversary proceeding. The judge considered 11 U.S.C. § 727 as the exclusive way to proceed to raise fraudulent transfer relief. That way, the court observed, was closed because Mr. Rooz had not made the motion but had relied on the nondischargeability provisions of the Code. The motion to dismiss was granted without leave to amend. Further, the court held it had no jurisdiction over Mrs. Roberta Kimmel based on the claims asserted in the adversary proceeding. It entered its Order of Dismissal on July 11, 2006.

Petitioner filed a timely notice of appeal to the Bankruptcy Appellate Panel of the Ninth Circuit. It filed its Memorandum, not for publication, on December 29, 2006. The Memorandum is attached hereto as Appendix B. A timely appeal to the United States Court of Appeals for the Ninth Circuit was filed. The court of appeals affirmed the Memorandum Decision of the appellate panel on November 25, 2008 (Appendix A). The court of appeals ruled that the complaint failed to allege justifiable reliance and held that the strict rules provided in Rule 9(b), governing allegations of fraud, were to be applied to transfers by the parties before the court which are of the type embraced by fraudulent transfer statutes. It determined that Mrs. Kimmel was not a proper party and refused to allow amendment. Petitioner, thereafter, filed his Petition for Panel Rehearing on December 19, 2008. It was denied on December 23, 2008 (Appendix C).

Mr. David Kimmel was discharged in bankruptcy on February 13, 2006. A Trustee Report of no distribution was entered on December 8, 2005. The trustee had concluded that there are no assets to administer for the benefit of creditor. The bankruptcy case was closed on February 13, 2006.

REASONS FOR GRANTING THE PETITION

I. Whether 11 U.S.C. § 523(a)(2)(A) denies discharges from fraudulent marital property transfers is a significant issue which should be decided by the Court.

A. The Decisions have failed to allow discovery, the right to a factual hearing to prove fraudulent actions and the right to amend to plead rights which are shown in the proceeding as required by this Court when the debtor seeks dischargeability of all of his pre-petition debts.

The Decisions below (Decisions) have lost sight of the basic issues when a debtor seeks a discharge. The petition of a debtor sets in motion a demand that all of the debtor's liabilities be tried on pain of injunctive disobedience. To exclude a conspiracy to defraud a creditor from jurisdiction under the Code (Code refers to United States Bankruptcy Code, Title 11, U.S.C.) is in conflict with this Court. This Court has declared that such a claim for discharge allows a full hearing based on facts as to whether a discharge of fraudulent action will result. A California judgment creditor has a primary right to be protected from a plan to prevent satisfaction of his judgment through a conspiracy of the spouses and insiders. *Mejia v. Reed*, 31 Cal. 4th 657 (2003); *Filip v. Bucurenciu*, 129 Cal. App. 4th 825, 28 Cal. Rptr. 3d 884 (2005); *Wolkowitz v. Beverly*, 374 B.R. 221, *rev'd in part, dismissed in part*, __ B.R. __, 2008 DJDAR 18795 (Bankr. 9th 2007); *Sanwa Bank v. Chang*, 87 Cal. App. 4th 1314 (2001); *Brenelli Amedeo v. Bakara Furniture Co.*, 29 Cal. App. 4th 1828 (1994) (involving corporate discharge); *Stoner v. Walsh*, 24 Cal. App. 3d 938 (1972).

Changes in the language covering nondischargeability for fraud indicate that Congress intended the fullest possible inquiry to ensure that all requests for discharge arising out of fraud are excepted. *Archer v. Warner*, 538 U.S. 314, 123 S. Ct. 1462 (2003); *Brown v. Felsen*, 442 U.S. 127, 99 S. Ct. 2205 (1979). The Decisions limit actions seeking to raise fraudulent transfers to 11 U.S.C. § 727. Under the ruling of this Court a creditor is entitled to obtain his full panoply of remedies based upon fraud by making the creditor's claim nondischargeable. This is so regardless of whether a judgment is itself based upon fraud. The elimination of the requirement of a "judgment" sounding in fraud by replacement with "liabilities" in 1903 expresses a policy of allowing full inquiry as to all debts based upon fraud, including those arising from injuries to creditors specified in State Uniform Fraudulent Transfer Acts. This assertion follows from *Brown v. Felsen*, *supra*, at 138 and *Connell v. Walker*, 291 U.S. 1, 54 S. Ct. 257 (1934). There is no contradiction between section 727 and section 523. *McClellan v. Cantrell*, 217 F.3d 890 (7th Cir. 2000). The former applies to matters connected to the estate, whereas the latter grants the full protection of the law from requests for immunity. The adversary proceeding may result in a jury trial and allow an award of damages. *Granfinanciera, S.A. v. Nordberg*, 498 U.S. 33, 109 S. Ct. 2782 (1990); *see* 3 Norton Bankruptcy Law and Procedure Practice (3d) § 57:63.

B. Petitioner's complaint sets forth specific facts actionable under the requirements for pleading conspiracies established by this Court.

Fed. R. Civ. P. 9(b) only requires the statement of facts so that a pleading of damages from conspiracy is not merely conclusionary. *Roberts v. Francis*, 128 F.3d 647 n.5 (8th Cir. 1997); *Rich-Taubman Assoc. v. Stamford Operating Company*, 587 F. Supp. 875 (S.D.N.Y. 1984). *See also Mission Viejo National Bank v. Englander*, 92 B.R. 425 (Bankr. 9th 1988); *Vaughn v. Aboukhater*, 165 B.R. 904 (Bankr. 9th 1994); *In re Yadidi*, 274 B.R. 843 (Bankr. 9th 2002).

Rule 9(b) is to be read in conjunction with Rule 8. As a complaint seeking the non discharge of the State Order petitioner's complaint is specific. It alleges the fraudulent statements, damages suffered and the reliance upon the promise. Implicit in the promise to make modest monthly payments is that the debtor has enough collateral to support the pledge. As a complaint alleging a conspiracy to prevent satisfaction of his judgment which seeks remedies of exception and damages, petitioner names the conspirators as Mr. and Mrs. Kimmel, along with insiders, states the existences of a continuing conspiracy to defeat a judgment obtained in 1995, now involving $1,000,000, by entering into transfers of specified real property. The ruling below creates an erroneous burden of pleading on Mr. Rooz. The Amended Complaint, *supra*, meets the requirements of *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955 (2007). The test is, at p. 1965:

> [I]t simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of an illegal agreement.

At the time of the filing of the complaints below a more liberal rule of pleading was in place. *Conley v. Gibson*, 355 U.S. 41 (1998). The fourth amended complaint of Mr. Rooz closely follows the complaint in *Brenelli Amedeo v. Bakara Furniture Co.*, 29 Cal. App. 4th 1828, 1838 (1994), which allowed a fraudulent transfer case to proceed after the bankruptcy of the corporation.

C. The Decisions are in conflict with the Seventh and Sixth Circuits in limiting section 523(a)(2)(A) to fraudulent misrepresentations.

The opinion of the Bankruptcy Appellate Panel states:

> Given our charge to construe section 523(a) narrowly, the availability of section 727(a) to deny a scheming debtor a discharge on timely request, and the absence of authority in the Circuit supporting the use of the bankruptcy court's equitable powers to expansively interpret the Code, we decline to hold that Rooz's generalized allegations that one or both of the Kimmels engaged in a scheme to prevent Rooz from collecting his judgment states a claim for relief against Kimmel under 523(a)(2)(A).

It has been respectfully urged herein that when "Fraud" is raised, a reverse construction is required so that misuse of the Code is to be discovered and the fruits prevented. The Decisions seek to limit the anti-fraud provisions of 523 to fraudulent misrepresentations which involve in fact statements to the charging party. Judge

Posner in *McClellan* has shown that this conclusion is contrary to the law of "Fraud" and, thus, the intent of Congress. The section represents a determination to prevent debtors from obtaining discharges from any type of fraud. In this analysis Judge Posner was following the statements of this Court in *Brown*, supra, that bankruptcy would not allow discharges growing out of offenses against good morals, 442 U.S., at 138.

The Bankruptcy Appellate Panel for the Sixth Circuit has entered its agreement with Judge Posner. *Mellon Bank v. Vitanovich*, 259 B.R. 873 (Bankr. 6th 2001).

D. Judicial Estoppel, Estoppel and the intention to hide assets allow factual inquiry upon the request for a discharge.

The pleading of promissory fraud and the identification of specific fraudulent transfers have been held not state to claims for relief. The court erred in not applying the principles of Judicial Estoppel to the promises of Mr. Kimmel to the State Court. *Hamilton v. State Farm & Cas. Co.*, 270 F.3d 778 (9th Cir. 2001), citing *New Hampshire v. Maine*, 532 U.S. 742, 121 S. Ct. 1808 (2001); *Hay v. First Interstate Bank of Kalispell, N.A.*, 978 F.2d 555 (9th Cir. 1992); *Alary Corp. v. Sims*, 283 B.R. 549 (Bankr. 9th Cir. 2002); *In re Mahan*, 104 B.R. 300 (Bankr. E.D. Cal). Estoppel arises upon the representation to the state court, its consequent breach, and from the loss of benefits available to the creditor by the entry of the Order. Detriment is suffered by a foreclosure of rights to garnish wages under California Law. The doctrine of *res judicata*, would

prevent Mr. Rooz from seeking any further earnings of Mr. Kimmel at his place of employment.

Even assuming the complaint of the petitioner is subject to Rule 9(b); a special exception has gone unnoticed. Since the plaintiff is never privy to the conspiracy to defraud allegations where the missing facts are within the defendant's control, courts are reluctant to dismiss until a plaintiff has had a reasonable opportunity for discovery. The Rutter Group, Federal Civil Procedure Before Trial, *Pleadings* § 8:51.5, citing *Neubronner v. Miliken*, 6 F.3d 666, 671 (9th Cir. 1993). *See also Firestone v. Firestone*, 76 F.3d 1205, 1209 (D.C. Cir. 1996) ("To the contrary, leave to amend is 'almost always' allowed to cure deficiencies in pleading fraud.").

E. Dischargeabilty proceedings are not precluded because of the provisions of section 727 of the Code.

The Decisions below assert that Mr. Rooz has only limited rights, upon allegations of fraudulent transfers, to seek a trial for a denial of a general discharge. As seen above, sec. 523(a)(2)(A) protects the injured creditor whereas sec. 727 is limited to matters in connection with the estate. Section 727 applies, for the most part, a one year statute of limitations. Clearly, the Code has no intent to deprive a creditor, who possesses common law and statutory rights and remedies for his injury, to limit all these actions to a one year statute for a trial in a limited jurisdiction in the absence of a claim by the Trustee.

F. A creditor has authorization under the Code to issue summons to a third party spouse upon allegations that she is involved in fraudulent conduct injurious to the creditor.

The Decisions uphold the dismissal of Mrs. Kimmel as a party to the adversary complaint. As has been shown the dismissal is erroneous under the objective of the Code to limit bankruptcy to the honest but unfortunate debtors. Applying *McClellan* raises the provisions of the Code which allow the creditor to obtain a ruling which denies dischargeability of the wrongs of both spouses. Code § 524(a)(3); *In re Braziel, Judge v. Braziel*, 127 B.R. 156 (W.D. Tex. 1991).

Discovery may allow a motion to substantively consolidate the non debtor estate. *Sampsell v. Imperial Paper & Color Corp.*, 313 U.S. 215, 61 S. Ct. 904, *rehearing denied* (1941). *In re Daveh Lahijani, Kamira Simantob, et al v. Kavey Lahijani*, 2005 WL 4658490 (Bankr. C.D. CA 2005), *citing In re Bonham* (Bankr. D. Alaska 1998), *aff'd*, 229 F.3d 750 (9th Cir. 2000).

CONCLUSION

For the foregoing reasons, the Court is requested to enter its order that the judgment of dismissal be reversed or that this Petition for Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — MEMORANDUM OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED NOVEMBER 25, 2008

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 07-15155

BAP No. NC-06-1252-PaDB

In the Matter of DAVID KIMMEL,

Debtor,

WILLIAM B. ROOZ,

Appellant,

v.

DAVID KIMMEL,

Appellee.

Appeal from the Ninth Circuit
Bankruptcy Appellate Panel
Pappas, Dunn, and Brandt,
Bankruptcy Judges, Presiding

Argued and Submitted October 23, 2008
San Francisco, California

Appendix A

Before BRUNETTI, ARCHER,* and CLIFTON, Circuit Judges.

MEMORANDUM**

William B. Rooz ("Rooz") appeals the judgment of the Ninth Circuit Bankruptcy Appellate Panel ("BAP") affirming the bankruptcy court's dismissal of Rooz's complaint in an 11 U.S.C § 523(a)(2)(A) adversary proceeding. We have jurisdiction pursuant to 28 U.S.C. § 158, and we affirm. The parties are familiar with the facts of the case, so we repeat them here only to the extent necessary to explain our decision.

Despite being given four opportunities to amend his original complaint, Rooz has failed to state a claim for fraud.[1] With respect to Kimmel's allegedly fraudulent

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* The Honorable Glenn L. Archer, Jr., United States Circuit Judge for the Federal Circuit, sitting by designation.

** This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

1. In order to establish that a debt is nondischargeable under § 523(a)(2)(A), a creditor must establish five elements: (1) misrepresentation, fraudulent omission or deceptive conduct by the debtor; (2) knowledge of the falsity or deceptiveness of his statement or conduct; (3) an intent to deceive; (4) justifiable reliance by the creditor on the debtor's statement or conduct; and (5) damage to the creditor proximately cased by its reliance on the debtor's statement or conduct. *See Turtle Rock Meadows Homeowners Ass'n v. Slyman (In re Slyman)*, 234 F.3d 1081, 1085 (9th Cir.2000).

promise to pay Rooz $400 per month, the Fourth Amended Complaint does not allege how Rooz relied on this promise. For example, the Fourth Amended Complaint does not allege that Rooz agreed to forego further execution on the judgment if Kimmel made the promised payments or that Rooz was precluded from doing so. It also does not allege that Kimmel promised not to file for bankruptcy relief as a means of dealing with Rooz's debt.

Rooz's contention that Kimmel and his wife, Roberta Kimmel, engaged in a continuing fraudulent scheme to frustrate Rooz's collection efforts similarly fails. "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." Fed.R.Civ.P. 9(b). In order to properly plead fraud with particularity, the complaint must allege the time, place, and content of the fraudulent representation such that a defendant can prepare an adequate response to the allegations. *Moore v. Kayport Package Express*, 885 F.2d 531, 540 (9th Cir.1989). "[M]ere conclusory allegations of fraud are insufficient." *Id.* Rooz's allegations in the Fourth Amended Complaint are ambiguous as to the substantive facts constituting fraud. We agree with the BAP that Rooz's description of the Kimmels' "fraudulent scheme" fails to allege who committed the fraud or when and where the fraud occurred. Accordingly, the Fourth Amended Complaint does not plead fraud with the particularity required.

Appendix A

Because Rooz can prove no set of facts that would entitle him to relief, we agree with the BAP that the bankruptcy court was correct in dismissing Rooz's complaint.

Additionally, having properly dismissed Rooz's complaint against Kimmel, the bankruptcy court clearly lacked jurisdiction over Mrs. Kimmel for Rooz's fraud claim in connection with her husband's bankruptcy case.

AFFIRMED.

APPENDIX B — MEMORANDUM OF THE UNITED STATES BANKRUPTCY APPELLATE PANEL OF THE NINTH CIRCUIT FILED DECEMBER 29, 2006

UNITED STATES BANKRUPTCY APPELLATE PANEL OF THE NINTH CIRCUIT

BAP No. NC-06-1252-PaDB

Bk. No. 05-35269

Adv. No. 06-03047

In re:

DAVID KIMMEL,

Debtor.

WILLIAM B. ROOZ,

Appellant,

v.

DAVID KIMMEL,

Appellee.

Argued and Submitted on November 17, 2006
at San Jose, California

Filed – December 29, 2006

Appendix B

Appeal from the United States Bankruptcy Court
for the Northern District of California

Honorable Dennis Montali, Bankruptcy Judge, Presiding.

MEMORANDUM [1]

Before: PAPPAS, DUNN and BRANDT, Bankruptcy Judges

Creditor William B. Rooz appeals the bankruptcy court's order dismissing his complaint in a § 523(a)(2)(A) adversary proceeding pursuant to Fed. R. Civ. P. 9(b) and 12(b) without leave to amend.

We AFFIRM.

FACTS

David Kimmel and William B. Rooz were engaged in a real estate venture concerning properties in Northern California. Disputes had arisen between the parties as early as 1991. Rooz alleges that he was damaged by the actions of Kimmel and his wife ("Mrs. Kimmel"). Rooz filed an action against the Kimmels in Superior Court, San Mateo County, entitled *Rooz v. Kimmel*, No. 368482. Mrs. Kimmel thereafter filed a

1. This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except when relevant under the doctrine of law of the case or the rules of res judicata, including issue and claim preclusion. *See* 9th Cir. BAP Rule 8013-1.

bankruptcy petition under chapter 7[2] and the action against her was stayed pursuant to § 362(a). Case No. NC-93-33089. However, a judgment was entered on May 30, 1995, against Kimmel for $114,834.99, which on remitter was increased to $515,000. Rooz alleges that the amount of the judgment debt had increased to $1,081,500 by May 30, 2006.

On July 7, 2005, the San Mateo Superior Court issued a writ of execution on the Rooz judgment against Kimmel directing that his wages be seized. On August 22, 2005, Kimmel filed a Claim of Exemption in San Mateo Superior Court, seeking to reduce the amount being garnished from his wages under the writ. On September 29, 2005, the superior court conducted a hearing at which it granted Kimmel's claim of exemption in part, and denied it in part. The court's order provided that Kimmel pay Rooz $400 per month, which Kimmel had suggested at the hearing, until the judgment debt was paid. The order was filed on September 30, 2005.[3]

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2. Unless otherwise indicated, all chapter, section and rule references are to the Bankruptcy Code, 11 U.S.C. §§ 101-1330, and to the Federal Rules of Bankruptcy Procedure, Rules 1001-9036, as enacted and promulgated prior to the effective date (October 17, 2005) of most of the provisions of the Bankruptcy Abuse Prevention and Consumer Protection Act of 2005, Pub. L. 109-8, April 20, 2005, 119 Stat. 23.

3. Rooz filed a Request for Judicial Notice with this Panel on August 28, 2006, asking that, pursuant to Fed. R. Evid. 201, we take judicial notice of two documents from the state court

(Cont'd)

Appendix B

Kimmel filed a petition under chapter 7 of the Bankruptcy Code on October 16, 2005. On Kimmel's Schedule F, he listed a debt to Rooz for $982,366.30, "for a judgment against the debtor that arises out of a real estate sales transaction that occurred more than ten years ago."[4] Kimmel was granted a discharge by the bankruptcy court on February 13, 2006.

On February 6, 2006, one week before the entry of the discharge, Rooz, acting pro se, filed an adversary complaint in the bankruptcy court seeking a determination that his judgment against Kimmel be excepted from discharge under § 523(a)(2)(A)(the "Complaint"). Specifically, Rooz alleged in the Complaint that:

> Defendant made representations to plaintiff which were false. Plaintiff believed defendant's representations to be true and relied upon them to his detriment. Plaintiff's reliance upon defendant's representations

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(Cont'd)

action relating to the wage garnishment and exemption claim: the "Order Determining Claim Exemption", filed on September 30, 2005; and a "Register of Actions" in *William B. Rooz v. David Kim[mel]*, Case no. Civ368482. Kimmel did not object to the Request for Judicial Notice. Since the contents of the documents are material to the issues we consider, the request for judicial notice is GRANTED.

4. Kimmel submitted an amended Schedule F on November 21, 2005, but did not change the entry for the Rooz debt.

> were reasonable since defendant was Plaintiff's business partner. Plaintiff sustained damages in excess of $500,000 as a proximate result of defendant's fraudulent conduct.

On February 17, 2006, Rooz amended the complaint by striking the words "business partner" and inserting the word "leasee" (the "First Amended Complaint").

On March 6, 2006, Kimmel filed a motion to dismiss Rooz's complaint because the fraud allegations in the First Amended Complaint were not pleaded with particularity as required by Fed. R. Civ. P. 9(b). A hearing in the bankruptcy court was held to consider Kimmel's motion on April 28, 2006, at which Rooz appeared and Kimmel was represented by counsel. The bankruptcy court granted Kimmel's motion to dismiss, but it also granted leave to Rooz to further amend the complaint within 20 days to plead with particularity the factual allegations supporting the claim of fraud.

On May 16, 2006, Rooz filed an "Amendment to Complaint," drawing the court's attention to three documents: (1) Letter Agreement to Settle Disputes Between Rooz and Kimmel, dated April 5, 1991; (2) Ms. Weckerle's Statement; and (3) the State Court Judgment. Accompanying the documents was Rooz's written statement that "The documents above contain the required specifics demanded by council [sic] Mr.

John G. Warner." (collectively, the "Second Amended Complaint").[5]

On May 25, 2006, Kimmel filed a Motion to Dismiss Adversary Proceeding Without Leave to Amend.

On or about June 6, 2006, Rooz submitted to the bankruptcy judge and opposing counsel, but did not file with the clerk, another document entitled "Complaint to Determine Nondischargeability under the Provisions of 11 U.S.C. § 523(a)(2)(A)" (the "Third Amended Complaint"). Unlike the earlier pleadings, which asserted a single claim for fraud, the Third Amended Complaint asserted three claims (1) fraud and false representation, (2) active concealment of assets and (3) fraudulent concealment. Kimmel submitted a Reply Memorandum which protested the late addition of the new claims yet addressed them seriatim.

On June 28, 2006, Maxwell Keith filed a notice of his appearance as attorney for Rooz. On July 5, 2006, Rooz

5. The Panel has reviewed the copy of the Second Amended Complaint provided in the Excerpts of Record and compared it with the copy in the adversary proceeding docket. Both copies are identical. Only the first of the three alleged documents, the Letter Agreement to Settle Disputes between Rooz and Kimmel, was filed by Rooz on May 16, 2006. This was confirmed by the bankruptcy court at the hearing on July 7, 2006, when the court stated, "Mr. Rooz on May 16th on his own filed something called 'Amendment to Complaint' that makes references to three documents, only one of which was provided, and even that was almost illegible because of the way it was photocopied." Tr. Hr'g 5:9-13.

through Keith filed an "Amended Complaint for Judgment Upon Frauds to Evade Payment of Debt Under 11 U.S.C. 523(a)(2)(A)" (the "Fourth Amended Complaint"). The Fourth Amended Complaint significantly expanded the allegations against Kimmel. Among other things, it accused Kimmel of fraudulently promising to pay the Rooz judgment in full in $400 monthly payments and of hiding assets and conspiring with insiders to transfer assets; and it attempted to add Mrs. Kimmel as a defendant.

On July 7, 2006, the bankruptcy court conducted a hearing on Kimmel's May 25th motion to dismiss. After argument, the bankruptcy court determined that Rooz's new claims set forth in the Third and Fourth Amended Complaints, that Kimmel failed to pay $400 per month, hid assets, failed to disclose assets and provide information about earnings, constituted objections to discharge under § 727(a), and were not properly raised in a § 523(a)(2)(A) complaint. Tr. Hr'g 9:1-7 (July 7, 2006). Further, the bankruptcy court concluded that the state court order requiring Kimmel to pay Rooz $400 a month was entered in violation of § 524 and therefore void. Tr. Hr'g 15:5-6. The court also determined that it had no jurisdiction over any potential claims by Rooz against Mrs. Kimmel. Tr. Hr'g 12:19 - 13:4.

Because it concluded Rooz had not stated with particularity any grounds to establish fraud under § 523(a)(2)(A), the bankruptcy court granted Kimmel's

motion to dismiss without leave to amend[6] in an order entered on July 11, 2006. Rooz filed a timely appeal on July 17, 2006.

JURISDICTION

The bankruptcy court had jurisdiction under 28 U.S.C. §§ 1334 and 157(b)(2)(A) and (K). We have jurisdiction pursuant to 28 U.S.C. § 158(b).

ISSUES

1. Whether Rooz's allegations that Kimmel fraudulently promised to pay $400 per month on the judgment debt states a claim for relief for fraud under § 523(a)(2)(A).

2. Whether Rooz's allegations that the Kimmels fraudulently concealed information or transferred assets states a claim for relief for fraud under § 523(a)(2)(A).

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6. As the Supreme Court observed in *Foman v. Davis*, leave to amend should be freely granted unless one of several factors is present. 371 U.S. 178, 182 (1962); *accord Johnson v. Buckley*, 356 F.3d 1067, 1077 (9th Cir. 2004); *Carroll v. Ft. James Corp.*, 2006 WL 3399286 *4 (5th Cir., November 27, 2006). Two of those factors are implicated here: undue delay and a repeated failure by Rooz to cure deficiencies in his various complaints. Rooz has not raised the bankruptcy court's decision to deny him leave to further amend the complaint as an issue on appeal.

3. Whether Mrs. Kimmel was a proper party-defendant.

STANDARD OF REVIEW

We review de novo dismissals for failure to state a claim under Fed. R. Civ. P. 12(b)(6), made applicable in bankruptcy proceedings by Fed. R. Bankr. P. 7012. *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006); *Decker v. Advantage Fund, Ltd.*, 362 F.3d 593, 595-96 (9th Cir. 2004). All allegations of material fact and inferences are viewed in the light most favorable to the nonmoving party. *Marder*, 450 F.3d at 448. A complaint should not be dismissed unless "it appears beyond doubt that the plaintiff can prove no set of facts that would entitle her to relief." *O'Loghlin v. City of Orange*, 229 F.3d 871, 874 (9th Cir. 2000). The scope of review on a motion to dismiss for failure to state a claim is limited to the contents of the complaint. *Marder*, 450 F.3d at 448.

The bankruptcy court's interpretation of the Bankruptcy Code is reviewed de novo. *In re Deville*, 361 F.3d 536, 547 (9th Cir. 2004).

Appendix B

DISCUSSION

I.

Analysis of the issues in this appeal is complicated by the fact that, at various times, Rooz has relied upon five different pleadings to allege his claims against the Kimmels: a complaint and four amended complaints. The hearing on July 7, 2006, at which the bankruptcy court reached its decision dismissing the adversary proceeding without leave to amend, was intended to consider Kimmel's motion to dismiss filed on May 25, 2006. That motion was presumably filed to test the allegations of Rooz's Second Amended Complaint. However, by the time of the hearing, Rooz had offered up two more versions of a complaint to Kimmel and the bankruptcy court. The court expressed its frustration in dealing with all these pleadings:

> Mr. Rooz on May 16th on his own filed something called "Amendment to Complaint" [Second Amended Complaint] that makes references to three documents, only one of which was provided, and even that was almost illegible because of the way it was photocopied. Then after that, in June, Mr. Rooz signs a document called "Complaint to Determine . . . Non-Dischargeability," [Third Amended Complaint] but doesn't file it and then Mr. Warner files his second motion to dismiss [the current motion before the court] and then you [referring to Rooz's counsel, Keith] apparently

> file without leave of court and don't provide a chambers copy, a document called "Amended Complaint for Judgment Upon Fraud[s]" [Fourth Amended Complaint] and proceed to allege matters that have nothing to do with Section 523 of the Bankruptcy Code.

Tr. Hr'g 5:9-23.

The bankruptcy court attempted to bring some order to the proceeding by treating the Fourth Amended Complaint as a reply to Kimmel's motion to dismiss without leave to amend. Tr. Hr'g 7:2-3. We have no quarrel with this approach. However, in the interests of justice, we believe the issues on appeal should be resolved by allowing Rooz to rely on the allegations in his Fourth Amended Complaint, filed by his attorney, to test the adequacy of his claims against the Kimmels.

But even allowing Rooz to rely upon the latest version of his complaint, filed without leave of the court, we still conclude, as did the bankruptcy court, that the action was properly dismissed for failure to state a claim. While the reasons for our conclusion in some respects differ from those relied upon by the bankruptcy court, if support exists in the record, a dismissal may be affirmed on any proper ground, even if the trial court did not reach the issue or relied on different grounds or reasoning. *Adams v. Johnson*, 355 F.3d 1179, 1183 (9th Cir. 2004).

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II.

In the first three complaints, Rooz argues that Kimmel's 1995 judgment debt to him should be excepted from discharge under § 523(a)(2)(A) because that debt arose from fraudulent misrepresentations made by Kimmel to Rooz. This allegation disappears in the Third and Fourth Amended Complaints. Instead, Rooz now argues that Kimmel's post-judgment statements and acts are part of a plan and scheme to fraudulently deprive Rooz of his ability to collect the judgment.

Rooz's argument is made in two parts. First, Rooz alleges that Kimmel represented at the September 29, 2005, state court hearing on the wage garnishment and exemption claim, that "he was willing to pay [Rooz] $400 per month in payment of the judgment." Rooz alleges that this "promise was made to obtain a settlement of the execution lien." Rooz then alleges that while he thereafter received $1,005 in payments from Kimmel, "[Kimmels] have now refused to make any payment" and that "[Kimmel] had no intention to perform his commitment to pay [Rooz] $400 per month." In other words, fairly construing these allegations, Rooz claims Kimmel made a fraudulent representation to him and the state court that he would pay off the judgment in $400 monthly payments.

Rooz's second theory is that the Kimmels have jointly engaged in a "continuous scheme to fraudulently and intentionally hide substantial assets from Rooz over the past four years." In this regard, Rooz alleges, based

upon unspecified information and belief, that Kimmels failed to disclose to the state court and the bankruptcy court their "substantial earnings;" "the true extent of the true holdings of the community in real estate properties;" and that the Kimmels had "arranged with insiders to hold title to real estate properties with the purpose and intent of preventing [Rooz] from obtaining payment on his judgment." Rooz concedes, however, that "[t]he full details of the scheme, plan and artifice [are] unknown to [Rooz]."

As discussed below, neither of Rooz's theories supports relief under § 523(a)(2)(A).

A.

Under these facts, Rooz's allegations that Kimmel fraudulently promised to pay Rooz $400 a month, without any intent of doing so, fails to state a claim for relief for fraud under § 523(a)(2)(A).

In essence, Rooz alleges that Kimmel committed promissory fraud. Promissory fraud is a subspecies of the action for fraud and deceit. *Downey Venture v. LMI Ins. Co.*, 66 Cal. App. 4th 478, 510 (Cal. Ct. App. 1998). Under California law, the elements of promissory fraud are identical to the elements of common law fraud, when the misrepresentation at issue is a promise made without intent to perform. *See Service by Medallion, Inc. v. Clorox Co.*, 44 Cal. App. 4th 1807, 1816 (Cal. Ct. App. 1996).

Appendix B

"The elements of § 523(a)(2)(A) 'mirror the elements of common law fraud' and match those for actual fraud under California law, which requires that the plaintiff show: (1) misrepresentation; (2) knowledge of the falsity of the representation; (3) intent to induce reliance; (4) justifiable reliance; and (5) damages. *Younie v. Gonya (In re Younie)*, 211 B.R. 367, 373-74 (9th Cir. BAP 1997), *aff'd*, 163 F.3d 609 (9th Cir.1998)(table decision)." *Tobin v. Sans Souci Ltd. Pshp. (In re Tobin)*, 258 B.R. 199, 205 (9th Cir. BAP 2001).

The bankruptcy court described the Fourth Amended Complaint as a "defective pleading." Tr. Hr'g 7:22. We agree with this conclusion, in the sense that the allegations of the complaint fail to state a claim for relief for fraud. Even if the allegations are presumed to be true, the complaint does not allege that Rooz extended any credit to Kimmel, nor is it alleged that Rooz otherwise justifiably relied upon Kimmel's representation to his detriment. Tr. Hr'g 7:11-13.

Kimmel had been indebted to Rooz since entry of the state court judgment in 1995. Rooz had caused Kimmel's wages to be garnished. In response to that garnishment, Kimmel claimed his wages exempt. It was at the state court hearing concerning that exemption claim on September 29, 2005, that Kimmel offered to make $400 monthly payments to Rooz. The state court incorporated this payment arrangement in its order to resolve the issues raised by Kimmel's exemption claim. The Fourth Amended Complaint does not allege that Rooz *agreed* to forego further execution on judgment if

Kimmel made these payments, or that he was precluded from doing so. It is also not alleged that Kimmel promised not to file for bankruptcy relief as a means of dealing with Rooz's debt. And the complaint does not allege what Rooz gave up in consideration of the monthly payment order. In fact, Rooz acknowledges that Kimmel paid him $1,005 "thereafter."

Even assuming that Rooz could prove that Kimmel's representation in state court that he would pay Rooz monthly payments was intentionally false, Rooz does not allege how he thereafter justifiably relied on that statement to his detriment for purposes of a claim under § 523(a)(2)(A). Justifiable reliance is one of the necessary elements of actual, nondischargeable fraud under § 523(a)(2)(A). Further, although the Ninth Circuit has never specifically ruled on this issue, the three circuits that have are unanimous in holding that justifiable reliance must be pleaded with particularity, alleging specific facts and actions taken by the victim of the fraud in reliance on the misrepresentation. *Roberts v. Francis*, 128 F.3d 647, 651 (8th Cir. 1997); *Williams v. WMX Technologies*, 112 F.3d 175, 177 (5th Cir. 1997); *S.Q.K.F.C., Inc. v. Bell Atlantic Tricon Leasing Corp.*, 84 F.3d 629, 633 (2d Cir. 1996).

Here, Rooz has provided no particularized examples of how he justifiably relied and suffered damages as a result of Kimmel's September 29 "promise"[7] to pay his

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7. The bankruptcy court committed a harmless error in determining that the state court's payment order was void

(Cont'd)

judgment debt. As a result, Rooz's Fourth Amended Complaint fails to satisfy the legal requirements for a claim under § 523(a)(2)(A).

There is also an obvious contradiction in the Fourth Amended Complaint which is highlighted by subsequent events. Rooz alleges that Kimmel "had no intention to perform his commitment to pay [Rooz] $400 per month." However, he acknowledges that Rooz "thereafter" received $1,005 in payments from Kimmel on the debt. These payments, apparently made both before and after Kimmel's bankruptcy petition was filed, discredit Rooz's argument that Kimmel never intended to pay the $400 per month.

Moreover, the complaint fails to adequately allege how Rooz was damaged by Kimmel's allegedly fraudulent statements. Indeed, it appears Rooz may have received more than $400 per month. Rooz does not allege Kimmel promised not to seek bankruptcy relief, and since Kimmel's bankruptcy filing excused his obligation to continue to pay Rooz according to the terms of the September 30 order, Rooz can not show that he was damaged by Kimmel's alleged fraud.

(Cont'd)
because it was entered in violation of the § 524 discharge injunction. The bankruptcy court relied on an error in the Fourth Amended Complaint that alleges that the order was entered on December 2, 2005, some three months after the bankruptcy petition was filed. Rooz has provided the Panel with the actual order entered by the state court on September 29, 2005, and filed on September 30, about two weeks before Kimmel's bankruptcy filing.

B.

While his argument is somewhat difficult to follow, Rooz also apparently contends that, prior to and after the filing of Kimmel's bankruptcy, the Kimmels engaged in a continuing fraudulent scheme[8] to frustrate Rooz's collection efforts. Specifically, Rooz alleges that Kimmel hid substantial assets from Rooz over the four years preceding his bankruptcy filing. Rooz insists these allegations state a claim to except his debt from discharge under § 523(a)(2)(A). Like the bankruptcy court, we disagree with Rooz.

The specific allegations made by Rooz of fraudulent acts are stated in paragraph 10 of his Fourth Amended Complaint:

> The Plaintiff is informed and believes and based upon such information and belief alleges that pursuant to said scheme and plan defendants have: (1) failed to disclose in the

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8. Rooz uses the terms "scheme" and "fraudulent scheme" to argue that there were not only fraudulent acts committed by Kimmel to avoid payment of his debt to Rooz but that the acts together "were part of a plan and scheme to fraudulently deprive [Rooz] of full payment of his judgment." [Fourth Amended Complaint at ¶ 8.] The existence of a scheme or plan tying various frauds together is not necessary for nondischargability under § 523(a)(2)(A); proof of any one fraud would be sufficient. However, as we discuss below, Rooz has not alleged with sufficient particularity in the Fourth Amended Complaint that any particular fraud took place.

> answers to the questionnaires required by the state court and this Court the substantial earnings of the Community; (2) failed to disclose to the state court and this court the extent of the true holdings of the community in real estate properties; namely, their home at 1007 15th Avenue, San Francisco, CA; the real estate at 1155 Ellis Street, San Francisco, CA, other real estate properties and bank accounts; (3) arranged with insiders to hold title to real estate properties with the purpose and intent of preventing plaintiff from obtaining payment on his judgment.

Later in the Fourth Amended Complaint, Rooz admits that the full details of the scheme, plan and artifice in which the Kimmels allegedly engaged were unknown to Rooz.

Rooz has failed to satisfy an elementary rule of pleading. Under Fed. R. Civ. P. 9(b), "In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." According to the Ninth Circuit, to properly plead fraud with particularity, the complaint must allege the time, place, and content of the allegedly fraudulent representation, act or omission, as well as the identity of the person allegedly perpetrating fraud. *In re GlenFed, Inc. Sec. Litig.*, 42 F.3d 1541, 1547 (9th Cir. 1994). "[M]ere conclusory allegations of fraud are insufficient." *Moore v. Kaypro Package Express*, 885 F.2d 531, 540 (9th Cir. 1989). A failure to plead fraud with the

requisite particularity constitutes sufficient grounds to dismiss a complaint. *Wool v. Tandem Computers, Inc.*, 818 F.2d 1433, 1439 (9th Cir. 1987).[9]

We doubt the three allegations offered by Rooz to describe the Kimmels' supposed "fraudulent scheme" show when or where the alleged fraud occurred. The allegations are ambiguous as to the substantive facts constituting fraud.[10] Like the bankruptcy court, we think Rooz's Fourth Amended Complaint is deficient in necessary detail to show Kimmel engaged in the sort of fraud required by § 523(a)(2)(A).

But even assuming Rooz's complaint is not technically defective, we believe the bankruptcy court was correct in construing its allegations to embody what

9. The elements of particularity of a fraud that must be pleaded under Rule 9(b) were very recently visited and affirmed by the Fifth Circuit in *Ft. James Corp.*, 2006 WL 3399286 at * 3 (Rule 9(b) requires that plaintiffs plead enough facts to illustrate "the who, what, when, where, and how of the alleged fraud" [citations omitted]).

10. For example, the allegations of the complaint are ambiguous concerning the alleged perpetrators of the frauds. Rooz argues that "defendants" were responsible for these actions. However, we can not tell from the complaint if Rooz alleges that the Kimmels jointly committed the alleged frauds, or if one or the other engaged in the conduct described in the complaint. In particular, we are left to wonder how Mrs. Kimmel may have been involved in making false statements to either the bankruptcy court or state court, because she was not a participant (at least to this point) in Kimmel's bankruptcy or wage garnishment proceedings.

are more properly objections to Kimmel's discharge under § 727(a), rather than grounds for an exception to discharge of Rooz's claim under § 523(a)(2)(A).

Rooz alleges that the Kimmels concealed assets and information so their creditors could not collect. This is precisely the sort of conduct the various provisions of § 727(a) are intended to punish by denying the offending debtor a discharge.[11] Such a severe remedy is justified because concealment or destruction of assets harms all creditors. As the bankruptcy court explained to Rooz's counsel,

> If a debtor hides assets, a timely objection to the debtor's discharge under Section 727 is the remedy and it benefits all creditors. It is not specific to individual creditors. There's no individual harm; it's harm generally and the consequence of general harm of hiding assets is to deny a discharge.

Tr. Hr'g 9:16-21.

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11. Section 727(a)(2) denies a discharge to a debtor who, with intent to hinder, delay or defraud a creditor or an officer of the estate, transfers or conceals property within one year before the date of filing of the petition, or property of the estate after the date of filing of the petition. Section 727(a)(3) sanctions a debtor who conceals, falsifies or destroys financial books and records. Section 727(a)(4) prohibits discharge of a debtor who lies to the court. And § 727(a)(5) denies a discharge to a debtor who fails to satisfactorily explain any loss or deficiency of assets.

But as the bankruptcy court correctly noted, an adversary proceeding seeking denial of discharge under § 727(a) must be commenced within 60 days of the meeting of creditors. Fed. R. Bankr. P. 4004(a). Since the meeting of creditors in Kimmel's bankruptcy case occurred on December 7, 2005, the 60-day period for filing objections to discharge expired on or about February 7, 2006. As a result, Rooz can not ask that Kimmel be denied a discharge under § 727(a) in an amendment to a complaint filed after this deadline.[12] As a result, Rooz is now barred from raising an objection to discharge.

Rooz argued in both the bankruptcy court and in his appeal briefs that, as explained in a decision of the Seventh Circuit, an intentional fraudulent scheme is actionable under § 523(a)(2)(A). *McClellan v. Cantrell*, 217 F.3d 890 (7th Cir. 2000). In that case, Cantrell filed a chapter 7 bankruptcy case in 1996. McClellan had years earlier sold machinery to her brother on credit. McClellan retained, but did not perfect, a security interest in the equipment to secure payment of the purchase price. When the balance owed to McClellan for the purchase price was around $100,000, the brother defaulted, and McClellan sued the brother, and asked the court to enjoin him from transferring the equipment.

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12. In addition, since Rooz by his own admission was aware of Kimmels' alleged fraud before the granting of discharge, Rooz can not seek revocation of discharge. § 727(d)(1)(providing that revocation of a discharge obtained by fraud is allowed only if "the requesting party did not know of such fraud until after the granting of such discharge . . . .")

With the suit pending, the brother "sold" the machinery to Cantrell, who knew about the suit, for $10. Before she filed her bankruptcy petition, Cantrell resold the machinery for $160,000 to another party, and in the words of the court, "she's not telling anyone what has happened to the money." *McClellan*, 217 F.3d at 892.

McClellan filed an adversary complaint against Cantrell seeking a determination that his claim against her for her role in this scheme was nondischargeable under § 523(a)(2)(A). The bankruptcy court, and later the district court, rejected McClellan's argument because he had not alleged that Cantrell made any fraudulent representations upon which he had relied. The court of appeals reversed, holding that § 523(a)(2)(A) fraud actions are not limited to misrepresentations or misleading omissions, but may include wider applications, such as participation in a fraudulent transfer. *McClellan*, 217 F.3d at 893. In its opinion, the Seventh Circuit expresses concern that the bankruptcy court should use its equitable powers to rectify an obvious fraudulent transfer. *Id.*

Based upon *McClellan*, Rooz argues that § 523(a)(2)(A) should encompass all types of potential fraudulent conduct, as opposed to the "false pretenses, false representation, or actual fraud" specified in the statute. Rooz argues that:

> The courts are to be wary of a plan or scheme which has been hatched to attempt to escape just obligations. *McClellan v. Cantrell* (7th

Cir. 2000) 217 F.3d 890. The Ninth Circuit has recently followed these precedents. *Muegler v. Bening* (9th Cir. 2005) 413 F.3d 980.

We think Rooz reads too much into *McClellan.* The creditor there suffered a particularized harm from the conduct of the debtor and her brother. They conspired to place the equipment, subject to McClellan's security interest, beyond his reach. Here, the harm alleged by Rooz against the Kimmels (that he was prevented from collecting) is much more general in nature. Indeed, the Seventh Circuit's opinion acknowledged that its interpretation was not a perfect fit with the statute, and that the facts could also be shoe-horned to fit an exception to discharge under § 523(a)(6). *McClellan*, 217 F.3d at 896.

We have examined the Ninth Circuit's *Muegler* decision, and contrary to Rooz's suggestion, there is no reference to *McClellan* in that opinion. Based upon the Supreme Court's ruling in *Cohen v. de la Cruz*, 523 U.S. 213, 118 S.Ct. 1212 (1998), *Muegler* interprets § 523(a)(2)(A) to allow an exception to discharge for any debt arising out of a debtor's fraud, without regard to whether the debtor received any benefit from that fraud. *In re Muegler*, 413 F.3d at 984. Again, given the vague allegations of Rooz's Fourth Amended Complaint, it is unclear what "debt" arose out of the Kimmels' fraud, even assuming the general kind of acts referenced therein can amount to fraud.

Based upon our research, neither the Ninth Circuit nor this Panel has endorsed the approach taken to interpretation of § 523(a)(2)(A) in *McClellan* in any reported decision. On the other hand, there is ample authority in this Circuit instructing that the provisions of the § 523(a) exceptions to discharge should be construed narrowly. *See, e.g., Cal. Franchise Tax Bd. v. Jackson (In re Jackson)*, 184 F.3d 1046, 1051 (9th Cir. 1999); *Bowen v. Francks (In re Bowen)*, 102 B.R. 752, 756 (9th Cir. BAP 2001).

Rooz does not allege how Kimmel's activities impaired his particular efforts to collect his debt, nor otherwise caused him any damage. Given our charge to construe § 523(a) exceptions narrowly, the availability of § 727(a) to deny a scheming debtor a discharge upon a timely request, and the absence of authority in our Circuit supporting the use of the bankruptcy court's equitable powers to expansively interpret the Code, we decline to hold that Rooz's generalized allegations that one or both of the Kimmels engaged in a scheme to prevent Rooz from collecting his judgment states a claim for relief against Kimmel under § 523(a)(2)(A).

C.

Based on the above analysis of the Fourth Amended Complaint, the Panel concludes that it appears that Rooz can prove no set of facts that would entitle him to relief. *O'Loghlin*, 229 F.3d at 874. Consequently, the bankruptcy court did not err in dismissing the adversary proceeding.

Appendix B

III.

Rooz admits that a spouse is not ordinarily made a party to an adversary proceeding seeking an exception to discharge where she is not a debtor. This Panel has consistently endorsed that position. *Beltran v. Beltran (In re Beltran)*, 182 B.R. 820, 825 (9th Cir. BAP 1995); *In re Maready*, 122 B.R. 378, 381-82 (9th Cir. BAP 1991). However, Rooz suggests that where a spouse engages in an attempt to hide community assets, she is a proper defendant in a § 523(a)(2)(A) complaint. To support this statement, Rooz cites several decisions from the California state courts.

State case law is generally not helpful in determining the extent of federal court jurisdiction. As the bankruptcy court noted, the action before it was to determine the extent of Kimmel's discharge. As such, the court's jurisdiction was founded upon 28 U.S.C. § 1334(b), authorizing the court to entertain the action as a "civil proceeding[] arising under title 11. . . ." Even if Rooz held a valid claim against Kimmel under § 523(a)(2)(A), we agree that the bankruptcy court lacked jurisdiction to entertain Rooz's claims against Mrs. Kimmel for common law fraud in connection with her husband's bankruptcy case. Any attempt to join her as a party-defendant in the Fourth Amended Complaint was therefore inappropriate.

In any event, since the bankruptcy court properly dismissed Rooz's complaint against Kimmel, at that point, the bankruptcy court clearly lacked jurisdiction over Mrs. Kimmel.

Appendix B

CONCLUSION

For the above reasons, we AFFIRM the bankruptcy court.

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING FILED DECEMBER 23, 2008

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 07-15155

BAP No. NC-06-01252-PaDB
Northern District of California,
San Francisco

In re: DAVID KIMMEL,

Debtor,

WILLIAM B. ROOZ,

Appellant,

v.

DAVID KIMMEL,

Appellee.

ORDER

Before: BRUNETTI, ARCHER,* and CLIFTON, Circuit Judges.

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* The Honorable Glenn L. Archer, Jr., United States Circuit Judge for the Federal Circuit, sitting by designation.

Appendix C

Appellant's Petition for Rehearing, filed December 8, 2008, is DENIED. Appellee's Motion for Rehearing to Include Rule 38 Sanctions Against Appellant and His Counsel, filed December 8, 2008, is also DENIED.

APPENDIX D — RELEVANT STATUTES

11 U.S.C. § 105

§ 105. Power of court

(a) The court may issue any order, process, or judgment that is necessary or appropriate to carry out the provisions of this title. No provision of this title providing for the raising of an issue by a party in interest shall be construed to preclude the court from, sua sponte, taking any action or making any determination necessary or appropriate to enforce or implement court orders or rules, or to prevent an abuse of process.

(b) Notwithstanding subsection (a) of this section, a court may not appoint a receiver in a case under this title.

(c) The ability of any district judge or other officer or employee of a district court to exercise any of the authority or responsibilities conferred upon the court under this title shall be determined by reference to the provisions relating to such judge, officer, or employee set forth in title 28. This subsection shall not be interpreted to exclude bankruptcy judges and other officers or employees appointed pursuant to chapter 6 of title 28 from its operation.

(d) The court, on its own motion or on the request of a party in interest—

(1) shall hold such status conferences as are necessary to further the expeditious and economical resolution of the case; and

(2) unless inconsistent with another provision of this title or with applicable Federal Rules of Bankruptcy Procedure, issue an order at any such conference prescribing such limitations and conditions as the court deems appropriate to ensure that the case is handled expeditiously and economically, including an order that—

(A) sets the date by which the trustee must assume or reject an executory contract or unexpired lease; or

(B) in a case under chapter 11 of this title—

(i) sets a date by which the debtor, or trustee if one has been appointed, shall file a disclosure statement and plan;

(ii) sets a date by which the debtor, or trustee if one has been appointed, shall solicit acceptances of a plan;

(iii) sets the date by which a party in interest other than a debtor may file a plan;

(iv) sets a date by which a proponent of a plan, other than the debtor, shall solicit acceptances of such plan;

(v) fixes the scope and format of the notice to be provided regarding the hearing on approval of the disclosure statement; or

(vi) provides that the hearing on approval of the disclosure statement may be combined with the hearing on confirmation of the plan.

11 U.S.C. § 523

Sec. 523. Exceptions to discharge

(a) A discharge under section 727, 1141, 1228(a), 1228(b), or 1328(b) of this title does not discharge an individual debtor from any debt—

* * *

(2) for money, property, services, or an extension, renewal, or refinancing of credit, to the extent obtained by—

(A) false pretenses, a false representation, or actual fraud, other than a statement respecting the debtor's or an insider's financial condition;

* * * *

Appendix D

11 U.S.C. § 727

Sec. 727. Discharge

(a) The court shall grant the debtor a discharge, unless—

(1) the debtor is not an individual;

(2) the debtor, with intent to hinder, delay, or defraud a creditor or an officer of the estate charged with custody of property under this title, has transferred, removed, destroyed, mutilated, or concealed, or has permitted to be transferred, removed, destroyed, mutilated, or concealed—

(A) property of the debtor, within one year before the date of the filing of the petition; or

(B) property of the estate, after the date of the filing of the petition;

* * *

(d) On request of the trustee, a creditor, or the United States trustee, and after notice and a hearing, the court shall revoke a discharge granted under subsection (a) of this section if—

(1) such discharge was obtained through the fraud of the debtor, and the requesting party did not

know of such fraud until after the granting of such discharge;

* * *

(e) The trustee, a creditor, or the United States trustee may request a revocation of a discharge—

(1) under subsection (d)(1) of this section within one year after such discharge is granted; or

(2) under subsection (d)(2) or (d)(3) of this section before the later of—

(A) one year after the granting of such discharge; and

(B) the date the case is closed.

APPENDIX E — AMENDED COMPLAINT DATED JULY 5, 2006

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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

Case No. 05-35269

Adversary No: 06-03047

In re

DAVID KIMMEL,

Debtor

WILLIAM B. ROOZ,

Plaintiff

v.

DAVID KIMMEL, ROBERTA KIMMEL,

Defendants

Appendix E

Amended Complaint for Judgment Upon Frauds To Evade Payment Of Debt Under 11 USCA 523(a)(2)(A)

Comes now the plaintiff in the above entitled action and following the Order of the Court upon the motion of defendant to dismiss with leave to amend alleges:

I. JURISDICTION AND VENUE

The Debtor, defendant herein, filed his Voluntary Petition under Chapter 7 of the United States Bankruptcy Code in the above entitled Court on or about October 16, 2005.

2. This court has jurisdiction over this adversary proceeding under the provisions of Title 28 U.S.C. sec. 1334. This adversary proceeding is brought pursuant to the provisions of 11 U.S.C. sec. 5239(a)(2)(A) and Bankruptcy Rule 7001(6). This is a core proceeding pending under 218 U.S.C. sec. 257(b)(2)(f).

FIRST CAUSE OF ACTION (Complaint for Damages Arising from Fraud)

1. Plaintiff is a creditor of defendant and a resident of San Mateo, CA.

2. Defendant Roberta Kimmel is and has been for many years last past the wife of David Kimmel. On or about July 7, 1993, Roberta Kimmel filed a petition in bankruptcy in the above entitled court, No. 93-33089. She obtained a discharge on or about March 15, 1994.

3. Plaintiff and defendants had entered into real estate transactions in 1990 concerning properties in Northern California.

4. Plaintiff was damaged by defendants during the course of these transactions and he filed an action against defendants in The Superior Court, San Mateo County, State of California in 1991, entitled Rooz v. Kimmel, No. 368482. By reason of the petition in bankruptcy filed by Roberta Kimmel, the action of Rooz against Mrs. Kimmel was stayed.

5. A judgment was entered in the aforesaid action on May 30, 1995 which provided, in part, that plaintiff recover from David Kimmel the sum of $114,834.99. After appeal, the judgment on remitter was $515,000, plus interest from the date of the original judgment. By May 30, 2006, the judgment in favor or plaintiff is approximately $1,081,500.

6. Defendants have refused to satisfy the judgment or any part thereof, and plaintiff issued execution upon the judgment against David Kimmel. After failed attempts, Plaintiff duly obtained a garnishment upon the employer of defendant David Kimmel, San Francisco Poultry, S. San Francisco, CA. Defendant thereafter filed a claim of exemption and hearing was set for September 29, 2005 in the Superior Court, County of San Mateo. At the hearing defendant David Kimmel stated to the Court, in the presence of plaintiff, that he was willing and able to pay plaintiff $400.00 per month in payment of the judgment. Thereafter the court, on December 2,

2005 entered its order that "[D]avid Kimmel shall pay the judgment creditor, William Rooz, $400 monthly until the debt is paid". Thereafter plaintiff received $1005.00 from the County upon the payment from defendant. Defendants have now refused to make any payment upon the promise of David Kimmel.

7. At the time of the promises made by defendant David Kimmel in court on September 29, 2005, defendant had no intention to perform his commitment to pay plaintiff $400.00 per month. Instead, the promise was made to obtain a settlement of the execution lien.

8. The statements and acts of defendants are but part of a plan and scheme to fraudulently deprive plaintiff of full payment of his judgment.

9. Defendants have engaged in a continuous scheme to fraudulently and intentionally hide substantial assets from plaintiff and have committed acts in furtherance thereof within the last four years.

10. Plaintiff is informed and believes and based upon such information and belief alleges that pursuant to said scheme and plan defendants have: (1) failed to disclose in the answers to the questionnaires required by the state court and this Court the substantial earnings of the community; (2) failed to disclose to the state court and this Court the extent of the true holdings of the community in real estate properties; namely, their home at 1607 15th Ave., San Francisco, CA; the real estate at 1155 Ellis St., San Francisco, CA, other real estate

properties and bank accounts; (3) arranged with insiders to hold title to real estate properties with the purpose and intent of preventing plaintiff from obtaining payment on his judgment.

11. Plaintiff is informed and believes and based upon such information and belief alleges that pursuant to said scheme and plan defendants have management and control of substantial earnings and properties acquired or maintained within four years last past which are available for the satisfaction of his indebtedness to plaintiff.

12. The full details of the scheme, plan and artifice of the defendant are unknown to plaintiff.

13. Plaintiff has expended substantial sums in attempting to obtain satisfaction of his judgment and entitled to reimbursement for these costs.

WHEREFORE, plaintiff prays:

1. That this Court enter its judgment that defendants, as a result of their fraudulent plan and scheme, are indebted to plaintiff in the sum of approximately $1,081,500, as of May 30, 2006, with interest accruing thereafter, and have had the ability to make full payment of the indebtedness to plaintiff.

2. That the Court determine that the defendants are the transferors of valuable assets which were transferred without reasonably adequate value

otherwise available for the satisfaction of plaintiff's judgment.

3. That the Court determine that the defendants are the true owners of valuable assets which are now available for the satisfaction of plaintiff's judgment.

4. That the court issue summons to all parties who are conspirators in the scheme and plan of defendant and enter such orders against them as are just to prevent fraudulent conveyances

5. That the Court allows plaintiff his costs of suit.

6. That the Court allows such other and further relief as the court deems just and proper in the premises.

Dated: July 5, 2006

_____

Maxwell Keith
Attorney for plaintiff

(2)

No. 08-1155

In The

Supreme Court of the United States

WILLIAM B. ROOZ,

Petitioner,

v.

DAVID KIMMEL,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED
(As Presented by the Petitioner)

1. Does 11 U.S.C. §523(a)(2)(A) allow an adversary proceeding based upon a debtor's entry into a conspiracy to transfer fraudulently assets owned jointly with the debtor's spouse or with insiders in order to defeat a creditor's judgment?

2. Are allegations of a conspiracy to enter into fraudulent acts to defeat a judgment, which specify that the debtor and his spouse engaged in effective transfers of specific assets, held by one or the other or by insiders, which assets have not been recorded or disclosed in bankruptcy schedules, and which assets include a promise to satisfy a creditor's judgment made to a state court without intention to perform, sufficient to obtain discovery under Rules 8 and 9(b) of the Federal Rules of Civil Procedure?

3. Is a State Court Order based on promises made by a debtor in a state collection proceeding to make payments upon the debt dischargeable as a matter of law, notwithstanding the Doctrine of Judicial Estoppel and notwithstanding allegations that the debtor's promise has been made with an intention to evade payment of the judgment?

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OPINION BELOW

There are no published opinions below pertaining to petitioner William B. Rooz and respondent David Kimmel. The only *related* opinion below is one involving David Kimmel's wife, Roberta Kimmel, which is reported at 378 B.R. 630, 2007 DJDAR 17265, and 367 B.R. 166.

JURISDICTION

The judgment of the court of appeals was entered on November 25, 2008. Petitioner filed a petition for rehearing on December 8, 2008, and that petition for rehearing was denied by the court of appeals on December 23, 2008. The Petition for Writ of Certiorari was filed on March 13, 2009.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1) which provides that cases in the courts of appeals may be reviewed by the Supreme Court by a writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

There are no constitutional provisions involved in this petition.

The only statutory provisions involved are 11 U.S.C. §523(a)(2)(A) which provides that a bankruptcy discharge does not discharge an individual debtor

oral argument the bankruptcy court granted respondent's motion to dismiss, but this time without leave to amend.

Thereafter, Rooz appealed to what is called the Bankruptcy Appellate Panel for the Ninth Circuit ("the BAP"), and later he appealed to the Court of Appeals for the Ninth Circuit. After written briefing and oral argument, both of those appellate courts affirmed the dismissal decision of the bankruptcy court. [A copy of the BAP's decision can be found in Appendix B to Rooz's petition, and a copy of the Ninth Circuit's decision can be found in Appendix A to Rooz's petition.]

Rooz now seeks relief through this Petition for Writ of Certiorari.

ARGUMENT

Both the BAP and the court of appeals were correct in their decisions to deny any relief to Rooz. There is absolutely no merit to his claim of nondischargeability.

I. ROOZ HAS NOT SPECIFIED ANY FRAUD IN CONNECTION WITH THE 1995 STATE COURT JUDGMENT.

As indicated above, the bankruptcy court dismissed Rooz's nondischargeability fraud claim on the ground

that Rooz had failed to allege specific acts of fraudulent conduct on the part of respondent as related to the state court judgment that Rooz had obtained against respondent in 1995.

In this petition, Rooz concedes that his adversary proceeding complaint lacked specific allegations of fraud as required by Fed. R. Civ. Pro. 9(b), which states that "[i]n alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." Instead, what Rooz is claiming in this petition is that the bankruptcy court erred by not allowing him to conduct discovery so that he could "find" the fraud that he was looking for to support his nondischargeability adversary proceeding complaint. But such argument puts the cart before the horse. Rule 9(b) requires a pleading of fraud or mistake with particularity ***first***, before one is allowed to conduct discovery. This is a basic pleading requirement that has existed in the federal rules of civil procedure for many years.

It is true that in certain cases the trial court may afford a plaintiff a limited opportunity to conduct discovery for the purpose of pleading fraud, but this occurs only after the plaintiff makes a showing that such discovery is likely to develop the facts needed for such pleading. [*Neubronner v. Milken*, 6 F.3d 666, 671 (9th Cir. 1993); *Emery v. American Gen. Finance, Inc.*, 134 F.3d 1321, 1323 (7th Cir. 1998).] But Rooz made no such showing in the present case, despite being given repeated opportunities to do so.

Indeed, in this petition and in the various court proceedings below, Rooz has never articulated any fraud on the part of the respondent in connection with the 1995 state court judgment. Common sense tells us that as the judgment creditor, Rooz is the person most knowledgeable of such fraud, if any occurred. Common sense also tells us that Rooz's failure to specify any fraud in his pleadings is clear and convincing evidence that ***no fraud actually occurred***.

II. A NONDISCHARGEABILITY CLAIM UNDER §523(a)(2)(A) CANNOT BE USED TO ASSERT AN OBJECTION TO DISCHARGE UNDER §727(d) IN WHICH IT IS ALLEGED THAT THE DEBTOR FAILED TO DISCLOSE ASSETS OR FAILED TO TURN OVER PROPERTY OF THE BANKRUPTCY ESTATE.

In bankruptcy, there are two forms of discharge objections. One form is an objection that a particular debt should be determined nondischargeable, such as, for example, wherein it is alleged that the debt occurred as the result of fraud on the part of the bankruptcy debtor. Authority for this type of nondischarge is found in 11 U.S.C. §523(a)(2)(A).

A second type of nondischarge arises when a creditor or other party in interest contends that the debtor has committed a bankruptcy fraud. A bankruptcy fraud occurs when the debtor fails to disclose fully his or her bankruptcy assets or has made

false statements in the debtor's bankruptcy filings. Authority for this type of nondischarge is found in 11 U.S.C. §727(d).

In Rooz's case, he alleged on a claim under the nondischargeability statute, §523(a)(2)(A). He never filed an adversary proceeding complaint under §727(d), and his attempt to use the §523(a)(2)(A) procedure to assert an objection to discharge under §727(d) was untimely because §727(e) contains a one-year statute of limitations for a §727(d) claim. That one-year deadline has long passed. Furthermore, to the extent that Rooz is claiming an objection to discharge pursuant to §727(a), which excepts from discharge a debtor who, for example, has concealed property of the estate, or who has failed to preserve financial records, or who has refused to obey a lawful order of the bankruptcy court, such an objection to discharge must be filed within 60 days from the date of the first meeting of creditors, as required by Bankruptcy Rule 4004(a). That 60-day deadline has also long passed.

Thus, the only claim that Rooz can timely assert is one under §523(a)(2)(A), but that claim requires particularity pleading, which Rooz has failed to allege, as noted above.

III. NO VIABLE FRAUDULENT TRANSFER CLAIM HAS BEEN PLEADED.

Throughout all of these proceedings, including the bankruptcy court, before the BAP, in the Ninth

Circuit, and now in this Court, Rooz has repeatedly argued that he should be allowed to assert a fraudulent transfer claim, and in support thereof he has cited a Seventh Circuit case entitled *McClellan v. Cantrell*, 217 F.3d 890 (7th Cir. 2000).

As respondent has explained in his previous appellate briefs on this issue, there is nothing remarkable about the *McClellan* case. Both the bankruptcy code and California law provide creditors with a remedy in the event there is proof of a fraudulent transfer of assets occurring prior to the commencement of a bankruptcy case. [See, 11 U.S.C. §548; see also, the California version of the Uniform Fraudulent Transfer Act, which can be found at California Civil Code §3439.]

The problem with Rooz's fraudulent transfer argument is the same problem that he has with respect to his fraud pleading in connection with his 1995 state court judgment. He has failed to state exactly what facts would give rise to a fraudulent transfer claim. He has not specified the date of the transfer, what kind of transfer occurred, a description of the property that was transferred, the name of the transferee, or any other particulars. Such specificity is required by Rule 9(b). Indeed, nowhere in Rooz's pleadings does he even attempt to allege a fraudulent transfer claim.

For instance, Rooz briefly discusses this fraudulent transfer issue on pages 8 and 9 of his petition, but in that discussion there in no attempt to describe

a fraudulent transfer. Why? The answer is obvious, ***there was no fraudulent transfer***, and to utter the two words "fraudulent transfer," without any supporting facts, does not establish a fraudulent transfer cause of action.

In Rooz's petition to this Court, he has made no attempt to remedy this obvious pleading defect. All he has done is cite to the *McClellan* case. The respondent respectfully submits that the citation to a case that states an undisputed point of law is not sufficient to allege a nondischarge cause of action cognizable in federal bankruptcy court.

As the respondent has argued in the courts below, no matter how one approaches Rooz's fraudulent transfer argument, whether the word "conspiracy" is used, or the words "fraudulent transfer" are used, or the general word "fraud" is used, the result is the same. Rooz's pleadings are inadequate to state a fraud claim under the specificity requirements of Rule 9(b), and the bankruptcy court was correct in rejecting them, and so was the BAP and the Ninth Circuit in affirming the bankruptcy court's decision on this issue.

And keep in mind this: When bankruptcy courts review a nondischargeability claim under §523(a)(2)(A), what the court reviews are the facts alleged in the underlying case, such as Rooz's 1995 state court judgment. It is fraud committed in that underlying case that counts. Allegations that the debtor failed to disclose all of his or her assets in his or her bankruptcy schedules, or has engaged a fraudulent transfer prior

to bankruptcy, or has committed some other form of bankruptcy fraud may be relevant in an objection to discharge proceeding under §727, ***but it is totally irrelevant to a nondischargeability proceeding under §523(a)(2)(A)***.

IV. BANKRUPTCY PROCEDURE DOES NOT AUTHORIZE THE ADDITION OF A NONDEBTOR PARTY TO A CREDITOR'S NONDISCHARGEABILITY CLAIM UNDER §523(a)(2)(A).

On page 11 of his petition, Rooz argues, as he did in the courts below, that he should have been given the right to add respondent's wife as a party defendant to Rooz's §532(a)(2)(A) nondischargeability case. On this point, Rooz is clearly mistaken.

There is no procedure in bankruptcy that allows a creditor to add a nondebtor person or entity such as the debtor's spouse to a §523(a)(2)(A) nondischargeability case. The sole purpose of a §523(a)(2)(A) nondischargeability case is to obtain a determination that a particular debt owed by the debtor is nondischargeable. There is nothing in that statute, and there is nothing in related Bankruptcy Rule 4007, that in any way grants the bankruptcy court authority to add a nondebtor spouse to such a proceeding. Whether the nondebtor spouse committed fraud or engaged in a fraudulent transfer of some kind or is concealing assets belonging to the bankruptcy estate is totally irrelevant to the issue of whether the debtor

committed some fraudulent act or omission in the underlying case (here, e.g., the 1995 state court judgment) which would warrant a finding that the debt owed to the creditor is nondischargeable.

On page 11 of Rooz's petition he cites several cases, including this Court decision in *Sampsell v. Imperial Paper & Color Corp.*, 313 U.S. 215, 61 S. Ct. 904, *rehearing denied* (1941), for the proposition that parties may be added to a bankruptcy proceeding. But none of those cases involves the limited scope of a nondischargeability case under §523(a)(2)(A).

Furthermore, as will be pointed out in Roberta Kimmel's opposition to Rooz's petition against her in this Court, which is Case No. 08-1157, Roberta Kimmel herself filed a voluntary Chapter 7 petition in 1993 and thereafter she received a discharge which embraced the failed real estate transaction which ultimately led to the state court judgment that Rooz obtained two years later in 1995 against Roberta Kimmel's husband, the respondent. This means that any claim that Rooz has against Roberta Kimmel is barred by 11 U.S.C. §524(a)(3), which enjoins the holders of pre-petition community claims from collecting or recovering from community property acquired by a discharged debtor post-petition. This is exactly what the situation is here with respect to the respondent's spouse, Roberta Kimmel.

CONCLUSION

The whole purpose of a Chapter 7 bankruptcy proceeding is to discharge one's debts and to obtain a fresh start. The exceptions to discharge are extremely limited, and the procedures that must be followed to obtain exceptions to discharge are very precise and are strictly enforced. There is nothing special about Rooz's claim that would warrant any deviation from that well-established and well-defined procedure.

Equally important, Rooz's petition raises no significant issues that demand the attention of this Court and its limited resources. There is no conflict among the circuit courts that needs to be resolved, there is no alarmingly new point of bankruptcy law that has been advanced by the courts below, and there is no issue of great national importance raised in this petition that needs this Court's attention.

For all of these reasons, Rooz's Petition for Writ of Certiorari should be denied.

Dated: April 15, 2009

Respectfully submitted,

JOHN G. WARNER

Attorney for Respondent,
David Kimmel